Filed 11/17/09 In re L.K. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re L.K., Jr., et al., Persons Coming Under the Juvenile Court Law.	B214777 (Los Angeles County Super. Ct. No. CK29524)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.K., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed as modified.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, James M. Owens, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

L.K. (father) appeals from the judgment of March 9, 2009,[1] declaring L., I., and L., Jr., (the children) dependents of the court under Welfare and Institutions Code section 300.[2]

Father argues that the dependency court failed to give him a meaningful opportunity to qualify as a presumed father. Father contends it was a violation of due process and Penal Code section 2625 to hold the jurisdiction/disposition hearing without giving him an opportunity to appear and be heard. He asks us to reverse the judgment and remand for appointment of counsel and a new jurisdiction/disposition hearing, and consideration of his sister for relative placement.

After our initial review of the appellate record, we advised the parties that in a prior dependency proceeding in 1999, the dependency court made a paternity order declaring father the children's father. We invited the parties to submit supplemental letter briefs on the relevance of this prior finding to father's contentions on appeal. Father submitted a letter brief stating that if he had been found to be a presumed father in 1999, the dependency court erred in finding he is an alleged father in the instant proceedings. Father further argues that if the 1999 finding was that father was merely a biological father, then the dependency court erroneously failed to give him a meaningful opportunity to qualify as a presumed father.

The Department of Children and Family Services defers to our analysis of the paternity issue but argues that reversal of the jurisdiction/disposition orders is not warranted.

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[1] Father's notice states he appealed "from the findings and orders of the court . . . March 10, 2009." There were no proceedings on March 10. We liberally construe the notice of appeal to be an appeal from the findings and orders of March 9, 2009. (Cal. Rules of Court, rule 8.100(a)(2) ["The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed."].) Thus, we reject the Department's contention that the notice of appeal was insufficient.

[2] Hereinafter, all statutory references are to the Welfare and Institutions Code, unless otherwise specified.

We conclude that it was error to find father is an alleged father, as the dependency court previously declared him the children's father. This error, and any error in holding the jurisdiction/disposition hearing in father's absence and without an attorney representing him, is harmless. Accordingly, we vacate the alleged father finding, and in all other respects affirm the judgment.

STATEMENT OF FACTS AND PROCEDURE[3]

The children were born in 1991(L., Jr.), 1992 (I.), and 1995 (L.) to father and their mother, who were not married. In 1996, father was sentenced to state prison for 29 years to life.[4] The children were declared dependents of the court in 1997. On February 25, 1999, the dependency court made a paternity order declaring father the children's father, gave sole physical custody to mother with visitation to father, joint legal custody to mother and father, and terminated dependency jurisdiction. A support order against father was filed in Family Court in April 2001.

On January 8, 2009, the children were detained, because the home was found to be so dirty, unhealthy, and hazardous that it was uninhabitable. Mother alleged father was the father of the children, and she did not know where he was incarcerated.

On January 12, 2009, the Department learned through the California Child Support Automation System of Child Support Enforcement (CCSAS-CSE) that, as of 2000, father was incarcerated at California State Prison, Sacramento, in Represa. He was listed as a noncustodial parent with an open child support case. Mother was listed as the custodial parent. The record contained father's date of birth and social security number.

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[3] Father does not challenge the sufficiency of the evidence to support the sustained allegations of the petition. Our recitation of the facts will focus on the facts relating to the procedural issues raised by father.

[4] The record is unclear as to whether father was convicted of murder or accessory. In light of the sentence imposed, it is unlikely the commitment offense was accessory.

At the detention hearing on January 13, 2009, the dependency court found father was the children's alleged father. The Department was ordered to make best efforts to locate father in custody. The matter was continued to February 3, 2009, for a pretrial resolution conference hearing.

Sixteen-year-old I. and 13-year-old L. told the social worker they had an ongoing relationship with father, including letter-writing and visiting in jail, and they wanted to continue to have a relationship with him. I. called him "dad." Seventeen-year-old L., Jr., who was nonverbal, did not make a statement.

On February 2, 2009, the social worker mailed father a notice of the February 3, 2009 jurisdiction/disposition hearing, addressed to him in Represa. At the pretrial resolution conference on February 3, 2009, the matter was continued to March 9, 2009, for a contested hearing by mother on the allegations of the petition.

An unsigned transportation order was sent to the warden of the state prison in Corcoran to transport father to the March 9 hearing, which stated that the hearing would be to declare the children dependents of the court under section 300. On February 20, 2009, a "CRT," whose name is illegible, declared that father "has stated to me, or by conduct indicated to me, that he . . . does not wish to attend the hearing in this matter." The declaration indicated the declarant "spoke with c/o Pinzon."

On February 26, 2009, a copy of the petition and notice of the March 9, 2009 jurisdiction hearing were mailed to father at Corcoran. The notice stated he had a right to be present at the hearing, and if he had any questions, he should contact Bambi Barnes. In a March 3, 2009 letter to Barnes, father stated that he received a notice of the March 9 hearing on the petition on March 3, 2009, he is the father of the children, and he "would like to be present at [his] children's hearing. I love my children unconditionally and please call me to Court."

On March 9, 2009, the dependency court found that notice of the proceeding was given as required by law to father, an alleged father, who waived his appearance from custody. After a hearing, the dependency court sustained allegations against mother that the children's home was filthy and unsanitary, and those conditions endangered the

children. No allegations were sustained against father. The dependency court struck the allegations that father failed to provide the children with the necessities of life and such failure placed the children at risk, under section 300, subdivisions (b) and (g). The children were declared dependents of the court, reunification services were ordered for mother, and no reunification services were ordered for father pursuant to section 361.5, subdivision (a). The matter was continued for a six-month review on September 8, 2009. Father filed a timely notice of appeal on March 18, 2009.

On June 26, 2009, counsel was appointed to represent father, the Department was ordered to prepare a statewide jail removal order for father for the six-month review hearing under section 366.21, subdivision (e), and the Department was ordered to consider the paternal aunt as a potential relative placement for the children.[5]

DISCUSSION

Presumed Father

Father contends that if the 1999 paternity order was a finding that he was the presumed father, the dependency court erred in finding he is an alleged father in the proceedings now on appeal. We agree. By appointing counsel to represent him and granting him visitation and joint legal custody, the dependency court in the 1997-1999 proceeding found he is the children's presumed father. (See *In re Zacharia D.* (1993) 6 Cal.4th 435, 449, 451 [only a presumed father is entitled to custody or reunification services and an opportunity to be heard at the jurisdiction hearing]; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120 [a presumed father is entitled to appointed counsel].) Moreover, the 1999 paternity order declaring him the children's father established him as the legal father of the children, with the legal rights and responsibilities of a presumed

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[5] We granted the Department's request for judicial notice of the June 26, 2009 minute order.

father.[6] (See *In re Mary G.* (2007) 151 Cal.App.4th 184, 192, 198, 203 ["'a paternity determination' . . . has the effect of giving the father presumed father status"] (emphasis omitted).) Parentage having been determined in 1999, the dependency court was not authorized in 2009 to make a different paternity finding. (Cal. Rules of Court, rules 5.635(a), (b) [the duty to attempt to determine paternity ends once parentage has been established]; Fam. Code, § 7612, subd. (c) [judgment of paternity rebuts another man's claim to be a presumed father].)

Any Errors are Harmless

The Department does not challenge father's characterization that he did not waive his appearance and that he requested to be present at the hearing. We agree father did not waive his appearance. The record shows the Corcoran prison employee signed a declaration that father waived his appearance before notice of the hearing and a copy of the petition were mailed to father. Upon receiving notice of the hearing, father personally communicated to the Department that he desired to attend the hearing and requested transportation.

Since he did not waive his appearance, father contends it was a violation of due process and Penal Code section 2625 to hold the jurisdiction/disposition hearing without giving him an opportunity to appear and be heard. The Department does not dispute the dependency court erred, but contends any error was harmless. We conclude the dependency court erred. (See *In re Zacharia D., supra,* 6 Cal.4th at p. 449 [due process requires a presumed father be given an opportunity to be heard at the jurisdiction hearing]; *In re Jesusa V.* (2004) 32 Cal.4th 588, 599 ["Penal Code section 2625 requires a court to order a prisoner-parent's temporary removal and production before the court . . . 'where the proceeding seeks to . . . adjudicate the child of a prisoner a dependent child.' [Citations.]"].)

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6 Indeed, a child support order was issued in 2001.

Father contends the error was prejudicial because counsel was not appointed to represent him, had he been present the court would have considered reunification, and he would have requested that the children be placed with his sister. He asks this court to reverse the judgment and remand the case for appointment of counsel and a new jurisdiction/disposition hearing "including consideration of his sister for relative placement."

Under any standard, the erroneous findings he was an alleged father and waived his appearance and the erroneous failure to provide him an opportunity to appear and be heard at the jurisdiction/disposition hearing are harmless. The dependency court struck all allegations relating to father. The sustained petition contains no allegations against father. Father does not challenge the sufficiency of the evidence to support declaring the children dependents of the court based on mother's conduct. As father is serving a life sentence, it is inconceivable the dependency court would have ordered reunification services for him had it realized he had presumed father status. (§ 361.5, subd. (e)(1) [the court has discretion to deny reunification services to an incarcerated parent who will not be discharged before the end of the reunification period].) Therefore, there is no likelihood father would have achieved a better outcome at the jurisdiction/disposition hearing in the absence of the errors. Father's argument that he was harmed by the errors, because counsel would have been appointed to represent him and his sister would have been considered for relative placement, are moot. In a subsequent order, counsel was appointed and the Department was ordered to consider the paternal aunt for relative placement.

DISPOSITION

The finding father is an alleged father is vacated, and the matter is remanded to the dependency court with directions to enter a finding declaring father the children's presumed father. In all other respects, the judgment and orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.